No. 84-457

Office-Supreme Court, U.S.
FILED
OCT 20 1984
ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MORTON L. MINSKY, individually, and on behalf of all others similarly situated,

Petitioner,

v.

AUTO DRIVEAWAY COMPANY, a Pennsylvania corporation; AAACON AUTO TRANSPORT, INC., a New York corporation; NATIONWIDE AUTO TRANSPORTERS, INC.; a Delaware corporation; HARVEY BLACKMAN; IRVING ZOLA; PAUL ZOLA; RALPH ZOLA; ALLEN F. HERMAN; NEDDIE HERMAN; DAVID L. STEINHAGEN; JOHN F. SOHL; and JOHN WILKINSON,

Respondents.

RESPONDENT AUTO DRIVEAWAY COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Is a shipper injured in his business or property within the meaning of Section 4 of the Clayton Act when he has been charged no more than the effective legal rate, and the Interstate Commerce Commission had jurisdiction to determine whether the rate was reasonable and non-discriminatory?

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Petitioner,

v.

AUTO DRIVEAWAY COMPANY, a Pennsylvania corporation; AAACON AUTO TRANSPORT, INC., a New York corporation; NATIONWIDE AUTO TRANSPORTERS, INC.; a Delaware corporation; HARVEY BLACKMAN; IRVING ZOLA; PAUL ZOLA; RALPH ZOLA; ALLEN F. HERMAN; NEDDIE HERMAN; DAVID L. STEINHAGEN; JOHN F. SOHL; and JOHN WILKINSON,

Respondents.

Respondents, Auto Driveaway Company, John F. Sohl, and John Wilkinson, request that the petition of Morton L. Minsky for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in the above-entitled case be denied.

STATEMENT OF THE CASE

Respondent-Defendant, Auto Driveaway Company, is engaged in the business of providing casual automobile driveaway services. The casual automobile driveaway industry is regulated by the Interstate Commerce Commission. In approximately 1974, respondents, Auto Driveaway, AAAcon Auto Transport, Inc., and Nationwide Auto Transporters, Inc., filed a joint ratemaking agreement with the Interstate Commerce Commission. The I.C.C. requested certain changes in the agreement. Respondents did not make the requested changes and allowed their application for a joint ratemaking association to lapse.

Respondent Auto Driveaway continued to file individual tariffs with the I.C.C. as required. Those filings were in complete compliance with the procedures established by the I.C.C. No shipper challenged any of respondent's rates as unreasonable or discriminatory. The I.C.C. accepted the tariffs, and the tariffs become effective pursuant to I.C.C. procedures.

In September, 1980, respondents were indicted for engaging in a conspiracy in restraint of trade. Auto Driveaway was convicted of this offense on April 8, 1981.

On September 14, 1981, Petitioner, Morton L. Minsky, a one-time shipper of his automobile, filed a class action under the antitrust laws requesting treble damages, but not injunctive relief. The District Court, finding that petitioner could not prove a legally cognizable injury, dismissed the treble damage action. The United States Court of Appeals for the Seventh Circuit affirmed *per curiam* on April 18, 1984. A Petition For Rehearing was denied on June 11, 1984.

REASONS FOR DENYING THE WRIT

I. REVIEW OF THE ISSUE PRESENTED IS NOT WARRANTED.

A. There Is No Conflict In Controlling Authority.

The Court below upheld the dismissal of plaintiff's treble damage antitrust action because plaintiff could not prove the predicate injury to his business or property. Relying on *Keogh* v. *Chicago & Northwestern Railway Co.*, 260 U.S. 156 (1922), the Court below found that plaintiff's action was barred because he had no legal right to a rate lower than the rate he was charged. This decision is not in conflict with any controlling authority.

In *Keogh*, this Court held that a private action for treble damages under the antitrust laws was inappropriate when the plaintiff shipper had paid only the effective legal rate. Keogh argued that as a result of a conspiracy in restraint of trade he paid more than a competitive rail freight rate for excelsior and flax tow. However, Keogh was charged no more than the rate filed with the Interstate Commerce Commission. This Court held that I.C.C. approval of the filed rate precluded a showing of injury sufficient to establish a right to treble damages under the antitrust laws.

Keogh was expressly reaffirmed in *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439 (1945). More recently, this Court, in *McLain* v. *Real Estate Board of New Orleans, Inc.*, 444 U.S. 232, 243 (1980), favorably referred to *Keogh* in stating that a failure to prove injury would limit available antitrust remedies to injunctive relief.

Other Circuit Courts of Appeal have consistently held, in suits by shippers involving a rate within the jurisdiction of the I.C.C., that *Keogh* barred a private treble damage action. *See, City of Groton* v. *Connecticut Light & Power Co.*, 662 F.2d 921,

929 (2d Cir. 1981); and *Essential Communications Systems, Inc.* v. *American Telephone & Telegraph Co.*, 610 F.2d 1114, 1121-22 (3rd Cir. 1979).

Petitioner cites no conflicting decision involving rates within the jurisdiction of the Interstate Commerce Commission.

B. A Ruling In This Case Will Not Create A Rule Of Law Having Application To Other Cases.

Plaintiff, recognizing the overwhelming authority supporting the decisions below, requests that *Keogh* and an unbroken line of authority stretching back 60 years be overturned. However, this case is not appropriate for the re-evaluation of *Keogh*. Review of this case will affect few, if any, other litigants, and will provide no guidance for either motor carriers or shippers subject to current I.C.C. regulation.

Plaintiff specifically notes recent Congressional efforts to deregulate common carriers. Admittedly, Congress substantially altered the I.C.C.'s regulatory power over motor carriers by passage of the Motor Carrier Act of 1980, Pub.L. 96-296, 94 Stat. 793. Since passage of that Act, motor carriers and shippers are faced with a regulatory scheme entirely different from the regulatory scheme in effect at the time of the filing of the rates challenged by plaintiff in this case.

These recent changes in the I.C.C. regulatory scheme do not impact the resolution of this case. Plaintiff challenges conduct that occurred entirely prior to the 1980 amendments to the Interstate Commerce Act. As a result, any decision in this case will offer no guidance for carriers or shippers subject to the current regulatory scheme. This case is the proverbial "White Elephant" involving questions of no current importance. For that reason, employing this case as a vehicle to re-evaluate *Keogh* would be inappropriate.

C. Review Is Inappropriate Because Plaintiff Has Failed To Pursue Administrative Remedies.

By passage of the Interstate Commerce Act, before the 1980 Amendments, Congress created a self-contained regulatory scheme for control of rates. Under that scheme all rates had to be reasonable, 49 U.S.C. § 10701 (Supp. III 1979) (amended 1980). The I.C.C. had authority to investigate rates, 49 U.S.C. §§ 10708 and 11701 (Supp. III 1979) (amended 1980); to order the suspension of rates, 49 U.S.C. § 10708 (Supp. III 1979) (amended 1980); and to order reparations in favor of shippers who paid more than a reasonable rate, 49 U.S.C. § 11705 (Supp. III 1979) (amended 1980). This structure permitted the orderly consideration of rates by the I.C.C. The I.C.C., which was best able to address the complex issues raised in a challenge to rates, was given jurisdiction to determine the legality of rates. These considerations have led this Court to require submission of rate related issues to the appropriate administrative agency in the first instance. See, *United States* v. *Western Pacific Railroad Company,* 352 U.S. 59 (1956).

In this case, plaintiff seeks treble damages under the antitrust laws for conduct which was entirely within the scope of I.C.C. regulation. However, the plaintiff has utterly failed to pursue those remedies available to him before the I.C.C. Plaintiff has also failed to seek an I.C.C. ruling on the issues raised by plaintiff's rate challenge. Plaintiff's inaction renders review of the decision below inappropriate.

II. THE COURT BELOW FULLY CONSIDERED AND PROPERLY DECIDED THE ISSUE.

A. Plaintiff Cannot Prove Injury Under The Antitrust Laws.

Underlying plaintiff's claim is the mistaken belief that treble damages are the only available antitrust remedy whenever a conspiracy in restraint of trade is found to exist. To the

contrary, the antitrust laws provide for injunctive relief as well as criminal sanctions. In fact, treble damages are permitted only upon the showing of a legally cognizable injury. Clayton Act § 4, 15 U.S.C. § 15 (1982). Here, as the Court below held, plaintiff cannot, as a matter of law, prove such injury.

Congress replaced unfettered competition among common carriers with I.C.C. regulation of carrier rates through passage of the Interstate Commerce Act. Thereafter, a shipper was entitled to a just, reasonable, and non-discriminatory rate. For that reason, the antitrust laws, with their mandate for competition, and the Interstate Commerce Act appeared to conflict. This Court reconciled those statutes in *Keogh*. That reconciliation prohibited treble damages when a shipper paid no more than the legal rate. As Justice Brandeis stated:

> The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier.

260 U.S. at 161-63.

Keogh controls this case. Plaintiff admittedly paid the effective tariff—no more and no less. The effective tariff was the legal rate until found procedurally or substantively unlawful by the I.C.C. Since the I.C.C. has never set aside the challenged rates, plaintiff paid the only rate to which he had a legal right. Having paid the rate to which he was entitled, plaintiff has suffered no antitrust injury.

Plaintiff attempts to distinguish *Keogh* by claiming that *Keogh* applies only to rates formally approved after full hearings by the I.C.C. This position ignores the nature of the Congressionally approved regulatory scheme. The lack of a hearing does not mean the lack of I.C.C. approval. Under the regulatory scheme in effect prior to 1980, the I.C.C. could investigate any motor carrier rate filed with it and could on its

own initiative suspend that rate, 49 U.S.C. §§ 10708 and 11701 (Supp. III 1979) (amended 1980). As a result, the I.C.C. has in the past fully investigated numerous motor carrier rates without protest by shippers. *See, e.g.,* 88th Annual I.C.C. Report to Congress (1974).

Incredibly, plaintiff's position would reward those shippers who choose to ignore I.C.C. procedures. By not challenging a filed tariff, a shipper can avoid an I.C.C. hearing, thereby, in plaintiff's view, preserving his antitrust claims. This interpretation of *Keogh* would turn the regulatory scheme established by Congress on its head. Contrary to Congressional intent, the courts rather than the I.C.C. would be required to determine the legality of motor carrier rates. Under such a system, the I.C.C. would no longer function as the regulator of rates as intended by Congress.

Plaintiff also seeks to distinguish *Keogh* by arguing that defendants "fraudulently" filed their tariffs with the I.C.C. This argument has been raised for the first time in this Court. Plaintiff did not allege fraudulent filing in its complaint and did not otherwise raise the issue before the District Court or the Seventh Circuit. Nothing in the record supports this new claim. Even if there were merit to plaintiff's claim, the I.C.C. in the first instance should decide whether the tariffs involved were filed in accordance with the proper procedures. For these reasons, it is singularly inappropriate to raise this question at this time.

B. Developments Since *Keogh* Do Not Undercut The Application Of That Decision To This Case.

In an effort to avoid the dictates of *Keogh*, plaintiff argues that post-*Keogh* developments have undercut the rationale of that decision. To the contrary, *Keogh* applies with full force to the conduct challenged in this case because that conduct predates Congressional deregulation of motor carriers. While post-1980 deregulation of motor carriers and post-1976 deregu-

lation of railroads may have altered the future application of *Keogh*, this is not the appropriate case to address those issues. This case involves essentially the same regulatory scheme which this Court reconciled to the antitrust laws in *Keogh*.

The plaintiff argues that the passage of the Reed-Bullwinkle Act in 1948, 62 Stat. 472, 49 U.S.C. § 5b, established the only acceptable method of obtaining antitrust immunity for joint ratemaking. Citing *United States* v. *Borden Co.*, 308 U.S. 188 (1939), plaintiff suggests that activities outside the scope of an express exemption are actionable under the antitrust laws. Respondent does not disagree with this broad statement. However, respondent believes that not all forms of relief are automatically available to plaintiff. Plaintiff must still satisfy the requirements of Section 4 of the Clayton Act and prove injury in order to be entitled to treble damages. *McLain, supra* at 243. Plaintiff cannot do so here.

The issue in this case is whether treble damages are available, and not whether the antitrust laws apply to defendant's conduct. It must be emphasized that the policies of the antitrust laws have been fulfilled in this instance. The challenged conduct was the subject of a criminal proceeding and defendant has been fined and enjoined from engaging in such conduct in the future. Plaintiff's action will not further the enforcement of the antitrust laws.

In addition, the Reed-Bullwinkle Act did not expand the availability of treble damages. The legislative history of the Reed-Bullwinkle Act demonstrates that, apart from providing an immunity for joint ratemaking agreements approved by the I.C.C., Congress intended that the antitrust laws "apply with full force and effect to carriers, *so far as they are now applicable. . . .*" *See, e.g.*, H. Rep. No. 1100, 80th Cong. 1st Sess. 5 (1947) (emphasis supplied). The Reed-Bullwinkle Act was passed to expand the railroads' protection from governmental antitrust actions by allowing the I.C.C. to immunize such control if certain safeguarding procedures were followed. In

view of this avowed purpose, it is non-sensical to suggest that Congress intended to overrule *Keogh* which had been in effect for 25 years.

Similarly, plaintiff's reliance on the Staggers Rail act of 1980 is misplaced. 94 Stat. 1895, 49 U.S.C. § 10101 *et seq.* That statute applied only to rail carriers and not to motor carriers. More importantly, plaintiff does not challenge any conduct occurring after 1980. The impact of deregulation is simply not raised by this case.

The plaintiff also argues that *Carnation Co.* v. *Pacific Westbound Conference,* 383 U.S. 213 (1966) holds that treble damages are entirely collateral to any available administrative remedies. However, *Carnation* did not even mention, let alone overrule *Keogh.* Instead, *Carnation* presented the issue whether the Shipping Act of 1916, 75 Stat. 762, 46 U.S.C. §§ 801-842, totally displaced the antitrust laws. That issue is not involved in this case since the antitrust laws have already brought to bear against defendant. In addition, the Federal Maritime Commission's regulatory powers addressed in *Carnation* were substantially different than regulation by the I.C.C. involved in this case.

CONCLUSION

Plaintiff is not entitled to treble damages because he can never demonstrate an injury legally cognizable under the antitrust laws. This case is an inappropriate case in which to re-evaluate *Keogh*.

The Petition for a Writ of Certiorari should be denied.

Respectfully Submitted,

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